

# What is the Situation of Constitutional Jurisdiction in Europe? Worrying News from Spain

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Daniel Toda Castán Do 2 Feb 2017

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Verfassungsblog has been continuously reporting about worrying developments concerning the Polish Constitutional Court during the past months. The siege under which this Court has been placed since the PiS took office in Warsaw remains (luckily) an isolated case in Europe. The European Union started “rule-of-law proceedings” under Article 7 TEU, but that attempt did not get very far. Although the situation in Poland is unique, the speed at which the Polish Constitutional Court has been subjugated should make the rest of us think about the regulations concerning our Constitutional jurisdictions and about the behaviour of other political actors with respect to them. The Polish experience shows that depriving a Constitutional Court of its independence is a matter of months. If the rest of the EU Member States want to be in a position to criticise PiS’ reforms and to exert the necessary political pressure to revert them, they have to be sure that their own domestic situation is irreproachable in this regard.

Recent developments in Spain have led me to these reflections, and I would like to describe them briefly here to sound the alarm about what happens in other European countries more discretely than in Poland, but also very disturbingly.

The Spanish Senate has to replace four judges of the Constitutional Court whose mandates expire this year. A reform to the Act on the Constitutional Court introduced in 2007 a new procedure to “federalise” the election of constitutional judges by the Spanish Senate, which is supposed to be a Chamber of territorial representation. According to the new procedure, the Parliaments of the 17 Autonomous Regions may propose two candidates each. The Appointments Commission of the Senate chooses four candidates (they have to conduct hearings for this purpose) and the Senate votes in a plenary session. The Constitution requires a 3/5 majority. If the Autonomous Regions present an insufficient number of candidates, the Appointments Commission of the Senate may include other names in its shortlist. The original idea was to enhance the involvement of the Autonomous Regions with the Constitutional Court, given that one of its competences is to resolve conflicts between the Central State and the Autonomous Regions.

However, the Regions do not seem to be taking this very seriously. The deadline to present candidates had been set at January 13<sup>th</sup>. By then, [only two of the 17 Regions had presented theirs](#). The Senate has extended the deadline until February 10<sup>th</sup>. Nevertheless, this extension seems quite useless: according to press reports, the [two main parties have already decided who the new constitutional judges will be](#). The governing Partido Popular (PP) and the Partido Socialista Obrero Español (PSOE) have together a 3/5 majority in the Senate. As they do not need to include anyone else in the negotiations, they have not done so. And they have already decided the names of the candidates.

They now only need to instrumentalise their majorities in the Parliaments of some Autonomous Regions, so that they formally propose the candidates the parties have agreed on, and to vote in the Senate. This obviously circumvents the purpose of the reform of 2007, and it probably explains why some Autonomous Regions do not see the interest in proposing any candidates, and some others just await instructions. The involvement of the Government in the appointment procedure of the Senate is shameless, despite the fact that the Government has the right to appoint another two judges of the Constitutional Court by itself. It has to be noted that PP and PSOE have traditionally decided the appointments of the judges of the Constitutional Court among themselves, both at the Senate and at the Congress. They do not seem to have taken notice of the reform of 2007 and of the substantial diversification of the Spanish political landscape, and they continue to do business as usual.

More outrageous than this is the fact that the agreement between PP and PSOE about the new judges includes an agreement about the Presidency and the Vice-Presidency of the Court. Despite the fact that the Act on the

Constitutional Court expressly says that the President and the Vice-President are elected by the judges of the Court by secret ballot, PP and PSOE do not seem to have any embarrassment in deciding among themselves who should hold those posts. And they do not have any embarrassment in letting the press know. The next question is, of course, how they are going to convince their preferred candidates to run for President and Vice-President, because this is a personal choice, and how they are going to press the other judges to vote for them. Needless to say, these arrangements between the two parties already violate the independence of the Constitutional Court before having been put into practice. Will the judges of the Court offer any resistance?

The reputation of the Spanish Constitutional Court is extremely low. Arrangements between parties, opportunistic reforms of the Act on the Constitutional Court, unfortunate decisions of the Court itself and bad timing have created the impression among citizens that the Court is nothing else than a puppet in the hands of the two biggest political parties. They do not seem to have realized this and not only remain faithful to their corrupt practices, but sharpen them. They circumvent the legal role of the Autonomous Regions, the Government interferes with the appointment by the Senate and parties unlawfully distribute positions in the leadership of the Court. The prestige of the Court will continue to sink in the eyes of the citizens. The legitimacy of the institution suffers attacks from the Catalanian front, and yet the other constitutional organs and the parties insist on weakening it. We will see the consequences in the future.

Unfortunately, Spain does not have any lessons for Poland in this respect. It would be interesting to hear from colleagues around Europe about the situation of their Constitutional jurisdictions.

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